No. 7302 10

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANG NAM,
Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii

BRIEF ON BEHALF OF APPELLANT

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BRIEF ON BEHALF OF APPELLANT

I.

STATEMENT OF THE FACTS

This appeal presents no question of fact and only one question of law.

Dang Nam by habeas corpus is seeking relief from deportation under a warrant of the Secretary of Labor. He was indicted in Honolulu on two counts charging a

narcotic violation. (R. pp. 8-10.) The first count charged an offense against the Act of February 9, 1909 (Narcotic Drugs, Import and Export Act). The second count charged a violation of the Act of December 17, 1914 (Harrison Narcotic Act). A single transaction was claimed, but pleaded under both statutes. He entered a plea of guilty, was sentenced to six months on the second count and put on probation for three years on the first count. (R. p. 5.) In passing sentence the judge recommended against deportation, as authorized by Section 19 of the Immigration Act of 1917 (Section 155, Title VIII, U.S.C.). Notwithstanding this recommendation, proceedings were commenced by immigration officers for his deportation as the term of his imprisonment approached an end and habeas corpus was finally resorted to by appellant to be relieved from deportation. The trial court held, however, that its recommendation against deportation was without jurisdictional justification, that the Act of February 18, 1931, withdrew from the court the power given it under Section 19 of the Immigration Act of 1917 to stay deportation in deserving cases and remanded appellant to the immigration authorities. (R. pp. 53-57.)

This Act of February 18, 1931, reads as follows:

> "Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this section) who, after February 18, 1931, shall be convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, ex-

> change, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provided in Sections 155 and 156 of this title."

It is in substance the same as the Act of May 26, 1922 (Section 175, Title XXI, U.S.C.: Narcotic Drugs, Import and Export Act) which reads as follows:

> "Any alien who at any time after his entry is convicted under section 174 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections."

II.

ERRORS RELIED UPON

Three errors are assigned (R. pp. 60-61) but they may all be summarized in one for the purpose of this brief as follows:

> That the court erred in holding and deciding that the Act of February 18, 1931 (Section 156-A, Title VIII, U.S.C.) makes deportation mandatory where an alien (except a non-dealer addict) is convicted of a narcotic violation, and that the court is without power to stay deportation by appropriate recommendation, as authorized in Section 19, Immigration Act 1917 (Section 155, Title VIII, U.S.C.).

III.

ARGUMENT

The Immigration Act of 1917 (Title VIII, U.S.C.) contained two sections dealing with deportation of undesirable aliens. These sections are 19 and 20, now 155 and 156 of the U. S. Code. We will refer to them here by their original numbers. Section 19 designates the aliens who are subject to deportation, such as prostitutes, pimps, anarchists, etc., and aliens convicted within five years after entry of a crime involving moral turpitude and imprisonment for one year or more. The section also puts it within the power of the judge to stay deportation, based upon conviction of a crime, by recommending against deportation at the time of passing sentence or within thirty days thereafter.

The following section (Section 20) sets up the machinery or method of deporting an alien found in one of the classes mentioned in the preceding section.

As the law stood following the passage of the Immigration Act of 1917, an alien violating the narcotic laws could not be deported following conviction unless he was sentenced to imprisonment for a year or more, and unless the conviction occurred within five years of his entry. To remedy this situation, Congress passed the Act of May 26, 1922 (Narcotic Drugs, Import and Export Act), which we have quoted above and which authorized the deportation of an alien convicted under the Act without reference to any period of imprisonment, and without reference to

the date of his entry. The Act provided that he should be deported in accordance with the provisions of Sections 19 and 20 of the Immigration Act of 1917.

Soon after the passage of this Act, the question was presented in this court of whether Congress had withdrawn the power given the trial court under said Section 19 to stay deportation in case of violations under the Act of May 26, 1922. The first decision of this court on the subject was *In re Wong Ging,* 299 Fed. 289. The defendant in this case was convicted of violating said Act of May 26, 1922, and the court recommended against deportation, but it was contended the court was without power in the premises. On appeal this court held that by reference the Act of May 26, 1922, *adopted the whole of the provisions relative to deportation contained in said Sections 19 and 20 and that the trial court still retained intact its power to effectively recommend against deportation.*

Several years later this court passed again upon substantially the same situation in *Weedin vs. Moy Fat,* 8 F. (2d) 488, where it reiterated the views it expressed in *Re Wong Ging, supra,* and held that, if Congress had intended in the Act of May 26, 1922, to take away from courts power to prevent deportation in cases arising under it, no reference to Section 19 would have been made, as Section 20 contains all the procedural details necessary and there would have been no occasion to mention Section 19.

Precisely the same situation is presented in the case at bar. If the Act of February 18, 1931, had only intended,

by reference to said Sections 19 and 20 to prescribe the procedure for deportation, it would have had no occasion to refer to Section 19 for the only thing applicable to deportation in that section is the provision giving the court power to recommend against it.

The views expressed in the two previously quoted decisions of this court were made clearer in *Chung Que Fong vs. Nagle,* 15 F. (2d) 789, where this same Act of May 26, 1922, was under consideration. In this case, the court held that said Act adopted *all the provisions of Sections 19 and 20, which were not by express terms inconsistent therewith.* It was contended in this case that an alien narcotic offender could only be deported where the proceedings were commenced within five years of his admission, a contention at variance with the express language of the Act of May 26, 1922, and plainly untenable.

The only decision cited by the court construing the Act of February 18, 1931, is a District Court decision (Re *Conte Grande,* 53 F. (2d) 475) and is not in point here. About the same contention was made there as was made in the *Chung Que Fong Case, supra,* and with the same result.

It is the duty of courts in construing an act of Congress to give effect, as far as possible, to every word of the act. In declaring, as Congress did, that deportations under the Act of February 18, 1931, should be in the manner provided by Sections 19 and 20 of the Immigration Act of 1917, it must be held that Congress intended to make all pertinent provisions of said sections, not inconsistent with

the Act itself, applicable, including the provision which sets forth the manner in which deportation may be stayed by the trial judge.

It is fair to assume that had Congress intended to take from the courts the power they have enjoyed for so many years of staying deportation in deserving cases, it would have done so in no uncertain words. Congress must be presumed to have realized the humane and beneficial use courts from time to time have made of this power in preventing essential miscarriages of justice, which the sweeping and general terms of the Act could not deal with.

At the conclusion of his decision, the trial judge said that Congress in enacting the Act of February 18, 1931, did so with notice of the construction this court had placed on the companion Act of May 26, 1922, in relation to deportation under Sections 19 and 20 of the Immigration Act of 1917. This is hardly an argument to support the trial court's position; rather the contrary. For this court has held in the cited cases that if Congress had only intended to refer to the machinery or actual procedure for deportation, it would have mentioned only one of the two sections, to wit: Section 20, but having mentioned the other section, to wit: Section 19, it was the court's duty to apply all provisions thereof applicable, including the one which prescribes the manner in which the court may stay deportation in a particular case.

The Act of February 18, 1931, must be construed in *pari materia* with Sections 19 and 20 of the Immigration Act of 1917. (See *Gottlieb vs. Mahoning Valley Sanitary*

Dist., 50 Sup. Ct. 333, 281 U.S. 770, 74 L. Ed. 1177; 59 C.J. 1043.)

In its effect upon an individual the statute must be classed as penal and like other penal statutes should receive a construction favorable to the accused. (*Wallis vs. Tecchio,* 65 F. (2d) 250.)

It is respectfully submitted, that the decision of the trial court is erroneous and should be reversed and defendant discharged.

Respectfully submitted,

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